



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Main Building Maintenance, Inc.--Costs

File: B-260945.6

Date: December 15, 1997

Garreth E. Shaw, Esq., for the protester.

Kathryn M. Burke, Esq., Department of the Air Force, for the agency.

John Van Schaik, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Attorney's fees need not be allocated between sustained and denied protest issues where all of the issues raised by the protester were related to the same core protest allegation which was sustained, and denied issues were not distinct and severable from issue sustained.
 2. Successful protester should be reimbursed company costs incurred in pursuing protest to the extent that such costs are sufficiently documented and are reasonable.
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DECISION

Main Building Maintenance, Inc. requests reimbursement in the amount of \$26,513.83, as its costs of filing and pursuing its protest, which we sustained in our decision, Main Bldg. Maintenance, Inc., B-260945.4, Sept. 29, 1995, 95-2 CPD ¶ 214.

We recommend that Main be reimbursed \$23,570.83.

BACKGROUND

In a series of protests, Main raised numerous allegations concerning the Department of the Air Force's evaluation of proposals, conduct of discussions, and award of a contract to DGR Associates, Inc. under request for proposals (RFP) No. F08637-94-R-7011, for military family housing maintenance services. We sustained the protest because the written source selection decision indicated that the source selection authority (SSA) awarded the contract to DGR based on a mistaken understanding of the differences between the DGR and Main proposals.

In particular, we agreed with Main that a number of "value added strengths" which the SSA attributed exclusively to DGR's proposal also were present in Main's proposal.

We also considered and denied allegations by Main that DGR should not have been given credit in the evaluation and source selection for proposing to respond to service calls in a specified number of days; that the evaluators deviated from the evaluation criteria in the RFP by giving DGR credit for needing no phase-in period; that the ratings assigned to its own and DGR's proposal were erroneous; that the agency conducted unequal discussions; and that the agency improperly permitted DGR to amend its proposal.

Since we denied these allegations, we stated that there was no need to reopen discussions. Rather, we recommended that the SSA reassess whether DGR's proposal offered the best value to the government. Finally, we recommended that the Air Force should reimburse Main for its reasonable costs of filing and pursuing its protest, including reasonable attorney's fees. 4 C.F.R. § 21.6(d)(1) (1995).

Main initially claimed reimbursement of \$24,691.33, including \$23,232.67 in attorney's fees and costs, \$1,432.91 for the time spent by Main's employees on the protest, and \$25.75 for Federal Express charges. Main's claim included a "Statement of Professional Services and Costs" which was prepared by the firm's attorney and which indicated that the attorney had spent 169.50 hours on the protest at a total cost of \$22,882.50. That statement also included a detailed breakdown by date of the time spent by the attorney, brief notations of how the time was spent, and a statement that the attorney had incurred \$350.17 in costs in pursuit of the protest. The attorney certified that he had performed the listed work on the protest at an hourly rate of \$135 and that the work had been billed to the client. Main also submitted a billing statement for its company personnel time, including hourly rates for three employees and the hours worked and total charges for each employee. The claim also included a copy of a Federal Express bill for \$25.75. Subsequently, Main amended its claim to include an additional 13.5 hours, at \$135 per hour, for a total of \$1,822.50, for time spent by its attorney pursuing the claim before this Office.

The Air Force has offered to reimburse Main only \$1,355.58 for attorney's fees and costs and company personnel costs. The Air Force has challenged most of the costs for the attorney's hours, all of the other costs claimed for Main's attorney, and all of the company's personnel costs claimed by Main. The following is a breakdown of the amounts claimed by Main and the amounts which the Air Force has offered to pay:

	Claimed by Main	Offered by Air Force
Attorney's fees for pursuing the protest	\$22,882.50	\$1,329.83
Attorney's costs	\$ 350.17	\$ 0.0
Company personnel costs	\$ 1,432.91	\$ 0.0
Company costs	\$ 25.75	\$ 25.75
Attorney's fees for pursuing the claim before GAO	\$ 1,822.50	\$ 0.0
Total	\$26,513.83	\$1,355.58

ATTORNEY'S FEES

As explained above, Main claimed reimbursement for \$22,882.50 for attorney's fees for pursuit of the protest and the Air Force has offered to pay only \$1,329.83 of that amount. The Air Force has no objection to the \$135 hourly rate charged by Main's attorney. Rather, the agency argues that Main is entitled to reimbursement only for the time spent by the firm's attorney on the single contention sustained in the protest--that the SSA based the selection decision between DGR and Main on his erroneous belief that only DGR's proposal included six "value added strengths."

In support of this approach, the Air Force asserts that the initial protest filed by Main on March 29, 1995, included three grounds of protest: (1) the Air Force failed to follow the evaluation criteria in the solicitation; (2) the Air Force failed to conduct meaningful discussions; and (3) the Air Force improperly evaluated the technical proposals of the protester and the awardee. The agency argues that no costs should be paid for the initial protest because all of these issues were unsuccessful and are severable from the issue that was sustained. For example, the Air Force argues that the third issue, challenging the evaluation of proposals, is distinct and severable from the sustained issue because the sustained issue focused on a different stage of the source selection process and presented different questions of fact and law. According to the Air Force, since Main raised its only successful issue in its supplemental protest, and since all the grounds for protest raised in the initial protest were denied, Main should be denied the costs of bringing the initial protest.

Main filed a second protest on May 18, 1995. The Air Force argues that Main should be reimbursed for only one-seventeenth of the attorney's fees for that protest submission because the second protest contained seventeen separate and distinct bases of protest, sixteen of which were dismissed or denied. Thus, the Air Force argues that Main is entitled to only \$142.94 (18 hours at \$135 per hour divided by 17). The Air Force takes a similar position on each of the other submissions made by Main's attorney in pursuit of the protest. On May 24, Main's attorney filed comments on the Air Force's initial agency report. According to the Air Force, only one-and-a-half pages, or one-twelfth, of that eighteen page document related to the issue which was sustained. As a result, the agency argues that Main is entitled to only \$157.50 (14 hours at \$135 per hour divided by 12=\$157.50) for the preparation of that document. Similarly, the Air Force argues that Main's comments on the agency's second report were 19 pages long with only one-and-a-half pages, again approximately one-twelfth, devoted to the sustained issue. Again using its page allocation method, the agency argues that Main is entitled to only \$286.87 for this document (25.5 hours at \$135 per hour divided by 12=\$286.87).

In response, Main argues that the Air Force's position is unreasonable. According to Main, since the prevailing issue concerned the propriety of the agency's evaluation of proposals and the reporting of the evaluation results to the source selection authority, it was necessary for its attorney to review all facts and documents surrounding the evaluation and reporting process. Specifically, according to Main, its counsel was required to review DGR's proposal, Main's proposal, the solicitation, source selection procedures, the technical evaluation and revised evaluation for each proposal, each offeror's best and final offer, all documents in the agency reports and the agency's responses to Main's comments. Main asserts that this review--all of which would have been necessary in order to pursue the single issue on which the protester prevailed, even if no other issues had been raised--was followed by several hours of research, drafting and revising to produce the attorney's final work products. In addition, Main states that the attorney's fees and costs claimed are only for work necessary for the protest ground that was sustained and all of the attorney's fees and costs related to work on the allegation that the agency failed to conduct meaningful discussions were segregated and not included in the firm's claim.

The underlying purpose of the provisions in the Competition in Contracting Act of 1984 (CICA) relating to the entitlement to bid protest costs is to relieve protesters of the financial burden of vindicating the public interest as defined by Congress in the Act. Department of the Navy--Request for Recon. and for Modification of Remedy, B-246784.4, Feb. 17, 1993, 93-1 CPD ¶ 147 at 6. In this regard, the bid protest process, as mandated by CICA, "was meant to compel greater use of fair, competitive bidding procedures 'by shining the light of publicity on the procurement process, and by creating mechanisms by which Congress can remain informed of

the way current procurement legislation is (or is not) operating." Lear Siegler, Inc., Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1104 (9th Cir. 1988), quoting Ameron v. U.S. Army Corps of Eng'rs, 809 F.2d 979, 984 (3d Cir. 1986). Congress believed that the prospect of successful protesters being reimbursed their bid protest costs was necessary to enhance the effectiveness of the bid protest process. See H.R. Rep. No. 98-1157, 98th Cong., 2nd Sess. 24-25 (1984).

As a general rule, we consider a successful protester entitled to costs incurred with respect to all issues pursued, not merely those upon which it prevails. Price Waterhouse--Claim for Costs, B-254492.3, July 20, 1995, 95-2 CPD ¶ 38 at 3. In our view, limiting recovery of protest costs in all cases to only those issues on which the protester prevailed would be inconsistent with the broad, remedial Congressional purpose behind the cost entitlement provisions of CICA. On the other hand, we have limited the award of protest costs to successful protesters where a part of their costs is allocable to a protest issue which is so clearly severable as to essentially constitute a separate protest. Interface Flooring Sys., Inc.--Claim for Attorneys' Fees, 66 Comp. Gen. 597, 599 (1987), 87-2 CPD ¶ 106 at 3.

This approach is consistent with the guidance provided by Supreme Court precedent with respect to other fee shifting statutes. In Hensley v. Eckerhart, 461 U.S. 424 (1983), the Court defined the conditions under which a plaintiff who prevails on only some of its claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1994). With respect to lawsuits raising multiple issues, the Court noted that, "[l]itigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." Id. at 435. More specifically, recovery should not be limited if the claims are interrelated--i.e., the successful and unsuccessful claims share a common core of facts or are based on related theories. See id. at 434-435; Department of the Navy--Request for Recon. and for Modification of Remedy, supra at 7.

In this case, Main in good faith raised a number of significant issues concerning the evaluation of proposals and the selection decision which warranted further development and detailed review. Most of those issues revolved to some degree around Main's basic assertion that the evaluation and selection were flawed. The protester prevailed with respect to its allegation that the selection of DGR's proposal for award was based on the SSA's erroneous understanding of the differences between the various proposals and, in our view, the fact that Main did not prevail on every allegation related to its basic assertion that the evaluation and selection were flawed makes the protester no less entitled to full recovery. Rather, since the successful and unsuccessful contentions share a common core of facts and are based on related legal theories, they cannot reasonably be viewed as a series of discrete protests.

The Air Force argues that the issue which was sustained--that the SSA based the selection decision on his erroneous belief that only DGR's proposal included six value added strengths--is distinct and severable from all of the other issues raised because the sustained issue focused on a different stage of the source selection process and presented different questions of fact and law. In this respect, the Air Force states that we found that "all elements of the Air Force's evaluation of proposals were reasonable" and the single flaw that occurred in the process was in presenting the evaluation results to the SSA.

We do not agree. Contrary to the Air Force's position, it was not our view that there were no flaws in the evaluation process. As explained above, the record showed that the SSA had a mistaken understanding of the differences between the various proposals. In particular, contrary to the SSA's understanding, a number of significant strengths which were attributed exclusively to DGR's proposal also were present in Main's proposal. Thus, the evaluation process was flawed because it failed to give the SSA an accurate understanding of the differences between the proposals.¹

In addition, although the Air Force focuses on the time listed in the attorney's billing statement for drafting documents such as protest submissions and comments, this focus ignores other time noted in the billing statement for review of the extensive record in the protest (including proposals, the solicitation, multiple evaluation documents, best and final offers, and agency responses to the protests), research, and communication with the client. Main argues, and we agree, that most if not all of this time would have been required simply to raise and pursue the single issue on which Main prevailed, regardless of whether the firm raised the other issues which were denied.

The Air Force also argues that Main should not be reimbursed for most of its attorney's fees incurred after the initial protest was filed but before the agency report was received by the attorney. According to the Air Force, 13.5 hours spent by the attorney during this timeframe was not incurred in pursuit of the protest.

¹The Air Force also argues that no attorney's fees should be reimbursed for the initial protest since the single issue sustained was raised in the supplemental protest, not the initial protest. We do not agree. In fact, as explained, the evaluation was flawed and, as the Air Force concedes, Main had argued in its initial protest that the evaluation was flawed.

The billing statement entries to which the Air Force objects concerned meetings and phone calls with the client concerning the status of the protest, review of client documents and research. Protesters are entitled to recover costs attributable to hours spent if they were reasonably necessary to the protest effort. Fritz Cos., Inc.--Claim for Costs, 73 Comp. Gen. 250, 253 (1994), 94-2 CPD ¶ 58 at 4. Although the Air Force argues that all of the time spent by Main's attorney after the protest was filed but before the report is not reimbursable, we have recognized that some review of the protest file by an attorney may be necessary during the course of the protest to inform the client or generally to stay knowledgeable about the protest. Id., 94-2 CPD ¶ 58 at 6 n.4. We conclude that the time spent by Main's attorney was necessary to the protest effort.

Accordingly, we reject the Air Force's position that Main should be reimbursed only for the costs related to the issue which was sustained. We conclude that numerous issues raised by Main concerning the evaluation of proposals and the selection decision shared a common core of facts and that the sustained issue was not so clearly severable from the issues on which Main did not prevail as to constitute a separate and distinct protest.

Nonetheless, Main is not entitled to reimbursement for all of the attorney hours which it has claimed. For instance, we agree with the Air Force that Main is not entitled to recover for 12.6 hours of its attorney's time providing legal advice on the acquisition after the decision on the protest was issued; these costs were unrelated to the pursuit of the protest.² Price Waterhouse--Claim for Costs, supra at 9. Main also is not entitled to \$13.50 for .10 of an hour spent by its attorney discussing settlement of the protest. Id. at 8. Main's attorney's billing statement also includes 6.1 hours for preparing the firm's claim to the Air Force for the costs of pursuing the protest. Our Bid Protest Regulations do not contemplate reimbursement of the cost of pursuing a claim before the contracting agency. Manekin Corp.--Claim for Costs, B-249040.2, Dec. 12, 1994, 94-2 CPD ¶ 237 at 6.

Main also is not entitled to reimbursement for its attorney's fees for the preparation and submission of a letter to this Office on August 1, 1995. That letter was a response to an Air Force submission concerning whether Main was prejudiced by allegedly improper discussions conducted with the firm. Consistent with Main's position that it is not claiming reimbursement for attorney's fees and costs related solely to the discussion issue, we conclude that Main is not entitled to reimbursement for 3 hours spent preparing the August 1 letter.

²The Air Force concedes that Main is entitled to recover its costs for 3 hours of attorney time incurred reviewing the decision.

After deducting 21.8 hours, or \$2,943 (at \$135 per hour) from Main's claim of 169.50 hours for attorney's fees (\$22,882.50) for pursuing the protest, we conclude that Main should be reimbursed \$19,939.50.

OUT-OF-POCKET EXPENSES

Main claims \$350.17 for its attorney's out-of-pocket expenses. This amount includes:

- (1) \$220 for 2,200 pages of photocopies of the agency report, client documents and GAO/agency correspondence at .10 per page;
- (2) \$40.50 for three Federal Express packages at \$13.50 each;
- (3) \$80.00 for faxing 160 pages of protest documents and responses to GAO, the client and parties to the protest at .50 per page; and
- (4) \$9.67 for long distance telephone calls to GAO, the agency, and opposing counsel regarding protest status and information/comments submitted.

The Air Force argues that Main has not adequately documented how each expense was incurred and how the expense relates to the protest. The Air Force particularly questions the photocopying charges. The agency explains that Main was represented by a single attorney so sharing documents was not necessary and, in any event, under the protective order which applied to the protest, Main's attorney was not permitted to make copies of protected material without the permission of the Air Force--which permission was never granted.

Claims for out-of pocket expenses must be supported by documentation which identifies the amount claimed, the purpose for which the expense was incurred, and how the expense relates to the bid protest. Komatsu Dresser Co.--Claim for Costs, B-246121.2, Aug. 23, 1993, 93-2 CPD ¶ 112 at 8. Although the Air Force insists that Main has not adequately documented how each expense was incurred and how the expense relates to the protest, as set forth above, Main has provided a breakdown of the expenses and explained how each expense relates to the protest. For example, Main's attorney explains that it is his office policy to make working copies of documents to preserve original documents received by his office. Although the Air Force complains that this practice is not necessary and that under the protective order Main's attorney was not permitted to make copies of protected materials, in our view it is a reasonable practice to make working copies of unprotected documents in order to preserve the originals and Main's attorney has explained that he made no copies of protected documents. In addition, although Main's submissions explain the number of Federal Express packages and fax pages

and the total charges for long distance phone calls, the Air Force has not challenged that explanation by arguing that those expense are not consistent with the record, but has simply repeated its general assertion that the expenses are not adequately documented. Under the circumstances, we have no reason to conclude that the claimed expenses were not reasonably related to the protest effort and we recommend that Main be reimbursed for all of its attorney's out-of- pocket expenses.

COMPANY COSTS

As explained above, Main claims \$1,432.91 for 42.55 hours spent by company employees on the protest. The company's billing statement includes hours worked and dates for each of three company employees, an hourly rate for each employee (\$37.36 for the president of the company and \$31.61 and \$32.45 for the other two employees), and a brief description of how the time was spent. The billing statement describes most of the work as telephone calls with the attorney, providing information to the attorney, meetings with the attorney, and review of information from the attorney. The Air Force challenges these costs on the basis that Main has not explained how the phone calls or meetings related to the protest and has not demonstrated that the rates identified for each of the employees are consistent with the compensation these employees generally receive. For those reasons, the Air Force argues that Main should not recover any of these costs. The agency, however, does concede that Main is entitled to recover \$25.75 in Federal Express charges because the firm provided a copy of the Federal Express bill.

In an affidavit, Main's president explains that the purpose of the work performed by himself and the other Main employees generally was to provide the firm's attorney with information or to obtain status updates on the protest. He also explains that the specific purpose for a meeting or phone call on a particular day is listed in the billing statement of the firm's attorney and that the hourly rates listed on the firm's billing statement are actual rates of compensation, with a reasonable allowance for overhead.

We conclude that Main is entitled to the company costs claimed. Although the Air Force argues that it cannot determine the time spent by each Main employee or how the work was related to the protest, by reviewing the firm's billing statement in conjunction with the attorney's billing statement, it is possible to determine what tasks were performed by particular company employees on particular days, the time spent, the hourly rate for a particular employee and the total charge for the task. The Air Force does not challenge the company's billing statement by arguing that the statement is inconsistent with the attorney's billing statement or that the time spent or rates of compensation of the Main employees were unreasonable, and based on our examination of the record we find only incidental inconsistencies between the company's billing statement and the attorney's billings statement. We

conclude that the time spent and the rates of compensation of the Main employees were consistent with what a reasonable person would employ in pursuit of the protest.

COSTS OF PURSUING THE CLAIM

Main also requests reimbursement for its attorney's fees for pursuing its claim for costs with this Office. Main has claimed \$1,822.50 for 13.5 hours spent by its attorney researching, preparing and pursuing its claim for costs with this Office.

Our Bid Protest Regulations, 4 C.F.R. § 21.6(f)(2), provide that we may recommend reimbursement of the costs of pursuing a claim before our Office. This provision is designed to encourage expeditious agreement between a successful protester and the contracting agency as to the quantum of recoverable costs. Komatsu Dresser Co.--Claim for Costs, supra at 8. The costs of pursuing a claim before our Office are recoverable if by their nature and amount they do not exceed that which would be incurred by a prudent person in a similar pursuit. Commerce Land Title of San Antonio, Inc.--Claim for Costs, B-249969.2, Oct. 11, 1994, 94-2 CPD ¶ 131 at 5 n.6. Here, Main's attorney spent 13.5 hours on research and preparation of its request for the costs of pursuing its claim before this Office and has certified that the time was spent on its claim for costs with this Office and that his \$135 per hour fee is in accordance with his agreement with Main. The Air Force has articulated no basis for asserting that the fees are excessive. Id. at 5. Based upon our own examination of the claim and the supporting documentation, we believe that the amount of attorney's time spent was reasonable. Accordingly, we recommend reimbursement of the claimed attorney's fees.

CONCLUSION

Of the total claimed costs of \$26,513.83, we recommend that the Air Force reimburse Main \$23,570.83.

Comptroller General
of the United States